RE SOUTHERN INVESTMENT BANK BHD & ANOR; APPLICANTS

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[ORIGINATING SUMMONS NO: D1-24-451-2008]
11 DECEMBER 2008

BANKING: *Banks and banking business - Orders to transfer and vest assets and liabilities - Application for - Whether approval of Minister of Finance pursuant to s. 49(7) of the Banking and Financial Institutions Act 1989 (BAFIA) obtained - Whether requirements of s. 50 BAFIA satisfied - Delegation of Powers Act 1956, s. 17*

This *ex parte* originating summons was for an application pursuant to s.50 of the Banking and Financial Institutions Act 1989 ('BAFIA') for orders to transfer and vest the assets and liabilities of the first applicant, Southern Investment Bank Berhad ('SIBB' or 'transferor') to the second applicant, Hong Leong Investment Bank Berhad ('HLIB' or 'transferee'). The transferee was a company incorporated under the laws of Malaysia, and the transferor was a merchant bank duly licensed under BAFIA. Both the applicants and two other entities (CIMB Bank Berhad and HLG Capital Berhad) have entered into a sale of business agreement ('the sale of business agreement'). Pursuant to cl. 3 of this agreement SIBB was to transfer its assets and liabilities to HLIB. The boards of directors of both applicants have approved the transfer and vesting of the assets and liabilities of SIBB into HILB. The approval of the Minister of Finance in respect of the agreement to transfer and to vest the assets and liabilities was required by s. 49 of BAFIA. It was claimed by the affidavits of the applicants that the Minister of Finance had, through Bank Negara Malaysia (BNM), given his approval for the sale of the assets and liabilities *via* a letter dated 14 May 2008 issued jointly by BNM and the Securities Commission ('the SC'). The letter was signed jointly by two officers, one from Bank Negara and the other from Securities Commission.

Held (dismissing the application):

(1) In light of the provisions of s. 50 of BAFIA, it was crucial for the applicants to show to the court that the approval of the Minister of Finance pursuant to s. 49(7) of BAFIA had been obtained. The applicants in the present case have failed to do

so. The applicants had merely shown to this court the letter issued jointly by Bank Negara and the Securities Commission. The content of the letter did not satisfy the requirements of s. 50 read with s. 49(7). (paras 13 & 14)

(2) It was essential for the applicants to exhibit either an approval letter signed by the Minister of Finance himself, or an approval letter signed by an authorized officer on behalf of the Minister of Finance pursuant to s. 17 of Delegation of Powers Act 1956. Further, since the Minister's approval was given pursuant to s. 49(7) of BAFIA, the approval letter must clearly state that the approval was given pursuant to an application by the applicants and upon considering the recommendation of Bank Negara. There was no suggestion by the applicants herein that the two officers/signatories, when they jointly signed the letter, were acting pursuant to s. 17 of the Delegation of Powers Act 1956. (paras 14 & 15)

(3) Since the Act is explicit that the communication of the Minister's decision to refuse approval must be made (in writing) by Bank Negara to the applicant but is silent as regard to the mode of communication in a case where approval is granted, the implication is that in a case where approval is granted the notification cannot be communicated by Bank Negara but must be made either directly by the Minister himself or by a delegated officer on behalf of the Minister pursuant to s. 17 of the Delegation of Powers Act 1956. (para 17)

Legislation referred to:

Banking and Financial Institutions Act 1989, ss. 49(7), (8), 50

Delegation of Powers Act 1956, s. 17

For the 1st applicant - LK Mak (Mimi Loke with him); M/s Kadir, Andri & Partners

For the 2nd applicant - KK Chan (YM Lee with him); M/s Shook Lin & Bok

Reported by Suhainah Wahiddudin

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This *ex parte* originating summons is for an application pursuant to s. 50 of the Banking and Financial Institutions Act 1989 ('BAFIA') for orders to transfer and vest the assets and liabilities of the first applicant, Southern Investment Bank Berhad ('SIBB' or 'transferor'), to the second applicant, Hong Leong Investment Bank Berhad ('HLIB' or 'transferee').

[2] Section 50 of BAFIA provides:

> **50. Application to High Court to facilitate agreement or arrangement for transfer of whole or part of business of licensed institution being given effect to.**
>
> (1) Where the Minister has granted his approval under section 49(7) to an application in respect of an agreement or arrangement under section 49(1)(b) or (c), the licensed institution whose business is to be transferred (hereinafter referred to as 'the transferor') and the licensed institution or other person to whom the transfer is to be made (hereinafter referred to as 'the transferee') may make a joint application to the High Court by way of an *ex parte* originating summons for such order of the Court as may be required by them to facilitate or enable the agreement or arrangement being given effect to, and in such application there may be sought all or any of the following orders:
>
> ...
>
> (2) On the hearing of an application under subsection (1), the High Court may grant an order in the terms applied for, or with such modifications or variations as the Court deems just or proper in the circumstances of the case.

[3] The above provisions of BAFIA provide that the application for the transfer of the business of a licensed institution to another person may be made jointly by both institutions by way of an *ex parte* originating summons to the High Court where the proposal to transfer has been approved by the Minister of Finance.

[4] The purpose of the application is to enable an agreement for the transfer of business to be facilitated and to be given effect to.

[5] Now, in the present case, the transferee is a company incorporated under the laws of Malaysia, and the transferor is a merchant bank duly licensed under BAFIA.

[6] Both the applicants and two other entities (CIMB Bank Berhad and HLG Capital Berhad) have entered into a sale of business agreement ('the Sale of Business Agreement'). Pursuant to cl. 3 of this agreement, SIBB is to transfer its assets and liabilities to HLIB.

[7] If this court were to grant the present application, the transfer and vesting of the assets and liabilities to HLIB is to be completed pursuant to the Sale of Business Agreement on the date as specified in the order of this court.

[8] The boards of directors of both applicants have approved the transfer and vesting of the assets and liabilities of SIBB into HLIB.

[9] The approval of the Minister of Finance in respect of the agreement to transfer and to vest the assets and liabilities is required by s. 49 of BAFIA. This provision states as follows:

> **49. Sanction required for reconstruction, etc. of licensed institutions**
>
> (1) No person shall enter into an agreement or arrangement:
>
> (a) which will result in a change in the control of a licensed institution or its bolding company;
>
> (b) for the sale, disposal, or transfer howsoever, of the whole or any part of the business of a licensed institution;
>
> (c) for the amalgamation or merger of a licensed institution with any other person; or
>
> (d) for the reconstruction of a licensed institution,

unless:

(A) the proposed agreement or arrangement is in writing; and

(B) all the parties thereto have first made an application in writing to the Minister for his approval of such agreement or arrangement and have obtained the Minister's approval thereto.

(2) An application under subsection (1) shall be made by submitting it to the Bank together with a copy of the proposed agreement or arrangement and all other information and documents as may be related, directly or indirectly, to the agreement or arrangement or relevant to its consideration.

(3) At any time after receiving an application and before it is determined by the Minister, the Bank may, by written notice, require the applicants or any of them, or any person who is a director, controller or manager of any of the applicants, to provide any additional information or documents.

(4) Where any additional information or document required under subsection (3) is not provided by any person from whom it is required within the time specified in the requirement or any extension thereof granted by the Bank, the application shall be deemed to be withdrawn and shall not be further proceeded with, without prejudice to a fresh application being made by the applicants.

(5) The Bank shall, on an application having been duly made in accordance with the foregoing provisions of this section and after being provided with all such information and documents as it may require, consider the application, and make a recommendation to the Minister whether the application shall be approved or refused and as to the modifications, variations or conditions, if any, subject to which it may be approved.

(6) A recommendation to approve an application shall not be made if the Bank is satisfied that it would be detrimental to the soundness of the financial structure of Malaysia to do so.

(7) Upon receiving an application and the recommendation of the Bank under this section, the Minister may approve the application with or without any modifications, variations or conditions, or refuse the application.

(8) Where the Minister refuses an appliction, the Bank shall notify the applicants in writing of the refusal.

(9) An application under:

(a) subsection (1)(b) shall not be recommended by the Bank for approval and shall not be approved by the Minister where the agreement or arrangement would result in the sale, disposal, or transfer howsoever, of any part of the business of the licensed institution to any person which is not a licensed institution, except in relation to a part of the business, being a part which does not require to be licensed under this Act; and

(b) subsection (1)(c) shall not be recommended by the Bank for approval and shall not be approved by the Minister except in the case of an amalgamation or merger with another licensed institution.

(9A) Subsection (9) shall not apply to any agreement or arrangement carried out by any person pursuant to the Malaysia Deposit Insurance Corporation Act 2005.

(10) In this section, "business" has the meaning assigned to it in section 50(8).

[11] It is claimed by the affidavits of the applicants that the Minister of Finance has, through Bank Negara Malaysia ('BNM'), given his approval for the sale of the assets and liabilities *via* a letter dated 14 May 2008 issued jointly by BNM and the Securities Commission ('the SC'). The letter is signed jointly by the following two officers, one from Bank Negara and the other from the Securities Commission, namely:

(1) Puan Nor Shamsiah Yunus, Assistant Governor, Bank Negara Malaysia; and

(2) Encik Ranjit Singh, Managing Director, Securities Commission Malaysia.

[12] The letter mentioned above is exhibited by the affidavits. The letter is addressed to the Director of Corporate Finance, CIMB Investment Bank Berhad. It is not clear from the affidavits as to why the alleged approval letter is addressed to CIMB Investment Bank Berhad and not to the two applicants in the present originating summons. Anyway, the letter reads:

No. Rujukan: 2201/134/3/2/CKY/MK1/MSB
MSD/ISD/IB/CORR(5)08

14 Mei 2008

Encik Ho Tat Heng
Pengarah
Kewangan Korporat
CIMB Investment Bank Berhad
Tingkat 10, Bangunan CIMB
Jalan Semantan
Damansara Heights
50490 Kuala Lumpur

Tuan,

Cadangan Pelupusan Aset dan Liabiliti Terpilih Southern Investment Bank Berhad kepada HLG Credit Sdn Bhd

Kami merujuk kepada permohonan-permohonan yang dikemukakan oleh Kumpulan CIMB dan Kumpulan Hong Leong mengenai perkara di atas.

2. Kami ingin memaklumkan bahawa Y.B. Menteri Kewangan II telah meluluskan cadangan pemberian lesen bank saudagar kepada HLG Credit Sdn Bhd (HLG Credit) dengan syarat Southern Investment Bank Berhad (Southern Investment) menyerah balik lesen bank saudagar yang dimilikinya kepada Bank Negara Malaysia sebaik sahaja cadangan pelupusan dan pemerolehan aset dan liabiliti terpilih Southern Investment selesai dilaksanakan.

3. Sehubungan ini, Y.B. Menteri Kewangan II bersetuju untuk memberi kelulusan-kelulusan berikut:

(i) Kelulusan di bawah Seksyen 49(7) ABIK bagi Kumpulan CIMB dan Kumpulan Hong Leong memeterai perjanjian atau perkiraan bagi pelupusan dan pemerolehan aset dan liabiliti terpilih Southern Investment;

dan

(ii) Kelulusan di bawah Seksyen 139(1) Akta Pasaran Modal dan Perkhidmatan 2007 (CMSA) untuk pelupusan kepentingan ekuiti dalam SBB Securities Sdn Bhd daripada SBB Capital Market Sdn Bhd kepada HLG Credit.

4. Cadangan penubuhan bank pelaburan 'Hong Leong Investment Bank Berhad' juga telah diluluskan di bawah Garis Panduan Mengenai Perolehan Kepentingan, Penggabungan dan Pengambilalihan oleh Kepentingan Tempatan dan Asing.

A 5. Berikutan penyerahan balik lesen bank saudagar milik Southern Investment kepada Bank Negara Malaysia sebaik sahaja cadangan pelupusan dan pemerolehan aset dan liabiliti terpilih Southern Investment selesai dilaksanakan, Y.B. Menteri Kewangan II turut bersetuju memberi kelulusan di bawah Seksyen 15(1) ABIK untuk membolehkan Southern Investment, yang bukan lagi merupakan sebuah bank saudagar berlesen, menggunakan perkataan 'bank' pada namanya 'Southern Investment Bank Berhad' untuk tempoh setahun dari tarikh surat ini bagi menyelesaikan hal-hal dokumentasi.

C Sekian, terima kasih

Yang benar,

Sgd.
(Nor Shamsiah Yunus)
Penolong Gabenor
Bank Negara Malaysia

Yang benar,

Sgd.
(Ranjit Ajit Singh)
Pengarah Urusan
Suruhanjaya Sekuriti
Malaysia

[13] I have dismissed the application. In my view, in the light of the provisions of s. 50 of BAFIA, it is crucial for the applicants to show to the Court that the approval of the Minister of Finance pursuant to s. 49(7) of BAFIA has been obtained. This the applicants in the present case have failed to do. The applicants have merely shown to this court the letter issued jointly by Bank Negara and the Securities Commission. But the letter merely says:

3. Sehubungan ini, Y.B. Menteri Kewangan II bersetuju untuk memberi kelulusan-kelulusan berikut:

Kelulusan di bawah Seksyen 49(7) ABIK bagi Kumpulan CIMB dan Kumpulan Hong Leong memeterai perjanjian atau perkiraan bagi pelupusan dan pemerolehan aset dan liabiliti terpilih Southern Investment;

[14] The above statement merely states that the approval of the Minister of Finance has been given pursuant to s. 49(7) of BAFIA to the CIMB Group and the Hong Leong Group to enter into an agreement or arrangement for the disposal and acquisition of selected assets and liabilities of Southern Investment. To my mind, the content of the letter does not satisfy the requirements of s. 50 read with s. 49(7). In my judgment, for this court to be fully satisfied that the requisite approval under s. 49(7) has indeed be given by the Minister of Finance, it is essential for the applicants to exhibit either an approval letter signed by the

Minister of Finance himself, or an approval letter signed by an authorised officer on behalf of the Minister of Finance pursuant to s. 17 of Delegation of Powers Act 1956. And further, since the Minister's approval is given pursuant to s. 49(7) of BAFIA, the approval letter must clearly state that the approval is given pursuant to an application by the applicants and upon considering the recommendation of Bank Negara.

[15] There is no suggestion by the applicants in the present case that the two officers/signatories whom I have named above, when they jointly signed the letter, were acting pursuant to s. 17 of the Delegation of Powers Act. Nonetheless, perhaps it might be of some interest if I were to set out in this judgment the provisions of s. 17 of the said Act. That section reads:

Signification of orders, etc., of, and signing of documents by, a Minister or Chief Minister

17 (1) Where by any written law power is given to a Minister or the Chief Minister of a State to make any regulation or order or give any direction, approval, permission or consent, or where any document is required to be under the hand of, or signed or countersigned by, such Minister, Chief Minister it shall be sufficient, unless it is otherwise expressed, for such regulation, order, direction, approval, permission, consent or document to be signified under the hand of, or signed or countersigned by, any officer under the administrative control or direction of such Minister or Chief Minister as the case may be and expressly or impliedly authorized by him by name or office in that behalf or in the case of a Minister under the hand of or signed or countersigned by a Deputy Minister.

(2) A certificate in writing purporting to be under the hand of the Minister or Chief Minister personally that any person was at the material date an officer under his administrative control or that any such officer was expressly or impliedly authorized by him to signify, sign or countersign a certain regulation, order, direction, approval, permission, consent or document shall be conclusive evidence of the facts stated in such certificate.

(3) Where any such regulation, order, direction, approval, permission, consent or document has been signified, signed or countersigned by any officer not authorized in that behalf the Minister or Chief Minister concerned as the case may be may ratify such signification, signature or countersignature and thereupon the same shall have effect as if at the date on which such signification, signature or countersignature was effected or affixed by such officer he had been duly authorized thereto.

[16] The learned counsel for the applicants in their joint written submission submit that it is not necessary for the Minister to personally communicate his approval to the applicants. They refer to s. 49(8) of BAFIA that states

> (8) Where the Minister refuses an appliction, the Bank shall notify the applicants in writing of the refusal.

[17] They argued that since the Minister's decision to refuse the application is notified through Bank Negara, it follows therefore that a decision to approve must also be notified through Bank Negara. With respect, I am unable to accept such an argument. In my opinion, if the intention of the Act is that both 'refusal of approval'and 'granting of approval' decisions were to be communicated through Bank Negara then the Act would have said so. On the contrary, I am inclined to the view that since the Act is explicit that the communication of the Minister's decision to refuse approval must be made (in writing) by Bank Negara to the applicant, but is silent as regard to the mode of communication in a case of where approval is granted, the implication is that in a case where approval is granted the notification cannot be communicated by Bank Negara but must be made either directly by the Minister himself or by a delegated officer on behalf of the Minister pursuant to s. 17 of the Delegation of Powers Act.

[Application dismissed; but with liberty to file afresh.]